

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

THE HERTZ CORPORATION

and

Case 7-CA-37553(2)

ODELL JOHNSON, An Individual

Roslyn Kelly, Esq., for the General Counsel.
Odell Johnson, of Detroit, Michigan, *pro se*.
Frank B. Shuster, Esq. (Constangy, Brooks & Smith), of Atlanta, Georgia, for the Respondent.

DECISION

Statement of the Case

THOMAS R. WILKS, Administrative Law Judge. The trial of this case was held before me on August 26 and 27, 1997, at Detroit, Michigan, pursuant to an unfair labor practice charge filed on August 30, 1995, by Odell Johnson, an individual, against The Hertz Corporation, and a complaint issued by the Regional Director, on March 5, 1997. The complaint alleges that the Respondent suspended Johnson, an alternate union steward, on August 26, 1995, and terminated him on September 1, 1995, because he had engaged in alleged concerted activities protected by the Act and because of union sympathies and activities. Respondent filed a timely answer which denied the unfair labor practices and which raised as a defense that the complaint allegations “. . . have been resolved through final and binding arbitration pursuant to an applicable collective-bargaining agreement and are not properly subject to being litigated in this proceeding.”

At the trial, all parties were given full opportunity to adduce competent, relevant testimony and documentary evidence.

The General Counsel adduced evidence of Johnson's grievance filing activities as an alternate steward for Local 299, International Brotherhood of Teamsters, AFL-CIO, herein the Union, under an existing collective-bargaining agreement, as well as his extensive letter writing activity complaining of working conditions to employees and a wide variety of governmental entities and agencies, and others. As found hereafter, because of the lack of compelling evidence of union activity animus and letter writing animus, the case, on its merits, boiled down to whether Johnson was suspended and discharged because of a deliberate falsehood he had made in his letter of August 24, 1995, immediately after having been told by the Respondent, as it alleges, that he could write as many letters as he wanted to, including letters addressed to President Clinton, but he must not write lies.

In cross-examination, Johnson admitted that his discharge had been the subject of an arbitration award pursuant to the provisions of the collective-bargaining agreement's grievance-arbitration procedures. During the General Counsel's presentation, neither the General Counsel nor the Respondent adduced this award into evidence. After the General Counsel

rested, the Respondent for the first time, at trial, moved to dismiss the complaint, which is silent about an arbitration decision, on the grounds that the General Counsel did not sustain the burden of showing that the Board should not defer to the arbitration decision. The Respondent, *inter alia*, cited *Spielberg Mfg. Co.*, 112 NLRB 1080 1955; *Olin Corp.*, 268 NLRB 573 (1984);
 5 *The Motor Convoy, Inc.*, 303 NLRB 135 (1991); *United Parcel Service*, 305 NLRB 433 (1991).¹ I denied the motion on the grounds that at the very least, I had to have before me, in the record, the arbitration decision itself. Also, because the facts of this case are so concise, I decided that in the interest of judicial economy and in order to avoid a possible resumption of the case after an adjournment, to consider the motion, that the Respondent should move forward with its
 10 defense upon the merits. Respondent complied and also adduced the arbitration decision into the record.²

The General Counsel takes the position that the arbitrator's decision, which found that Johnson stated a dishonest untruth in his August 24 letter, was repugnant to the Act because it
 15 did not consider the unfair labor practice issue raised by the complaint, i.e., the letter of August 24 was concerted activity, the protection of which was not lost by the statement of an untruth therein. The General Counsel argues that Johnson's statement was not an intended, deliberate untruth but rather reflected his honest recollection of what he had been ordered to do by the Respondent under penalty of discharge, i.e., not write any more letters whether true or false.
 20 Respondent's counter-position is that the untruth was deliberate, as found by the arbitrator, and as such was unprotected.

The General Counsel concedes that the arbitration proceeding, at which Johnson was present but chose not to testify and at which he was represented by the Union's attorney, was
 25 fair and regular.

Briefs were filed by the Respondent and the General Counsel, the last of which was received at the Division of Judges on October 20, 1996.

30 Based upon the entire record and in consideration of the briefs, I make the following.

Findings of Fact

I. Jurisdiction

35 At all material times, the Respondent, a corporation with an office and place of business at Detroit Metropolitan Airport in Romulus, Michigan, herein called Respondent's Romulus facility, has been engaged in the rental of automobiles and other vehicles. During the calendar year ending December 31, 1996, Respondent, in conducting its business operations described
 40 above, derived gross revenues in excess of \$500,000. During the same period of time, Respondent purchased goods and materials valued in excess of \$50,000 from suppliers located outside the State of Michigan and caused said goods and supplies to be shipped directly from points located outside the State of Michigan to its Michigan facilities.

45 It is admitted, and I find, that at all material times, the Respondent has been engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

¹ The processing of the underlying unfair labor practice charge in this case was deferred to the arbitral process by the Regional Director on September 28, 1995.

² For a contrary procedure where I adjourned the proceeding to evaluate the deferral issue as a threshold issue, see *United Parcel Service, Inc.*, 274 NLRB 346 (1985).

II. The Labor Organization

For some reason, the complaint does not allege that the Union is a labor organization within the definition of the Act. The Respondent has had a long-standing collective-bargaining relationship with the Union, which it recognizes as the exclusive collective-bargaining agent for several collective-bargaining units at its Detroit facilities, including one for transporters in which the Charging Party is employed. I take judicial notice of the Union's status and find that it is a labor organization within the meaning of Section 2(5) of the Act.

III. The Facts

The Charging Party, Odell Johnson, was hired by the Respondent in or about July 1993 to work as a part-time shuttler, responsible for transporting automobiles to and from the Respondent's Detroit rental operation. As a shuttler/transporter, Johnson's position was subject to the terms of a collective-bargaining agreement with Teamsters Local 299, which provided for final and binding arbitration of all disputes arising under the contract, including the discharge of employees.³

During his employment, commencing almost immediately, Johnson engaged in a massive letter writing campaign during which, by use of his own personal computer and word processor with electronic facsimile transmission capability (fax), he addressed and sent about 80 letters, mostly to coworkers, and a large proportion to a variety of corporate officials of the Respondent; its owner, the Ford Motor Company; a wide array of federal government agency officials; legislative persons; the NAACP, the U.S. Attorney General, and various other state and federal law enforcement officials. In these letters, he complained about personal racial discrimination, harassment, and coercion. He also complained about safety conditions, particularly the speeding of certain unit employees driving the Respondent's vehicles.⁴

In the summer of 1994, Harvey Sharpley was elected union steward. Afterward, he requested that Johnson act as an alternate steward. It is undisputed that the collective-bargaining agreement requires that the Respondent be notified in writing of such appointment but because of Sharpley's unawareness of the provision, it was not done. It is also not disputed that as an alternate steward, Johnson processed about 20 grievances of coworkers. In doing so, he dealt with the Respondent's Detroit City manager, Gary Wellman, and his subordinate manager, Nancy R. Johnson. It is not disputed that they did not object to his participation in initial grievance discussions wherein Odell Johnson characterized himself as an alternate or assistant steward. Wellman, however, asked business agent Donald Smith if Odell Johnson was an alternate steward and was told that he was not. Smith later was told by Sharpley that Johnson had been verbally appointed alternate steward.

There is no evidence that the Respondent manifested any animus to other union representatives who were also active grievance processors. Sharpley admitted that he had filed grievances and obtained remedial action from the Respondent without having experienced any animus.

³ The contract also contained a provision prohibiting discrimination against employees by reason of their union activity.

⁴ The General Counsel's unopposed motion to strike the following parts of Respondent's Exhibit section 3 as not constituting what they were proffered to be is hereby granted: Tabs 72, 66, 41, 22, 21, 15, 1-6.

With respect to the Charging Party, his letters reflected an aggressive stance to Wellman and Nancy Johnson and a lack of confidence in the unit's servicing business agent and later local union president, Donald Smith. In his letters, the Charging Party referred to Wellman as "dubious" and accused Nancy Johnson as using "gestapo like" tactics. In those letters, the Charging Party chided his coworkers for being too friendly with management, and he urged them to follow his leadership as "the voice to follow" and to accept him as "one of President Bush's 1,000 points of light." In his letters, he accused Nancy Johnson of causing him extreme stress. He also referred to instances of how frustrated employees had resorted to violence at other places of employment in the Detroit area, i.e., the U.S. Post Office and Ford Motor Company "massacres." Johnson expressed chagrin in his letters that the Respondent did not mend its ways after those massacres.

At least two employees complained about references in Odell Johnson's letters which they perceived affected them directly or indirectly and which raised potential racial conflict issues and their marital relationships.

The only evidence of any animus toward Johnson is a rather innocuous remark by Nancy Johnson to him in the fall of 1994. In a rather cryptic recollection, as elicited by the General Counsel, Odell Johnson testified that manager Johnson called him to her office and told him that they could be friends if he were to "cut down" on his grievance writing activities. When he asked why, she told him that he wrote more grievances than all of the other bargaining unit stewards combined. Given the tenor of the Charging Party's bitter references to manager Johnson in his letters, her indication of a lessened state of amiability hardly rises to the level of either coercion or vindictive animus.

In 1993, the Charging Party had filed an unfair labor practice charge against the Respondent concerning a prior suspension for his grievance activity. The charge was dismissed, and there was no attempt by the General Counsel to adduce any of the facts involved in the suspension as evidence of animus.

Indeed, the Regional Director and the General Counsel, to whom Johnson appealed, found, in dismissing the earlier charge, that the Respondent has reacted positively and resolved grievances which he had filed. Similarly, in this case, grievances that Odell Johnson had filed concerning safety were responded to affirmatively and ungrudgingly by the Respondent.

In late summer 1995, certain events occurred which were to lead to an end of August meeting between the Respondent's agents, the Union's agents, and Odell Johnson. The Respondent had become concerned about the truthfulness of Johnson's accusations. It had received two employees' complaints. Manager Johnson had complained to Wellman and to the Respondent's Employee Relations manager, Mike Kieleszewski, that the Charging Party had lied about her conduct of alleged harassment, coercion, and intimidation of him. They did not investigate to determine if Johnson's statements were in fact true, but because manager Johnson had contracted leukemia and needed a bone marrow transplant, they became concerned about the deleterious effects of stress she claimed she suffered as a result of Odell Johnson's accusations. In this same context, they became concerned about the complaints of the two employees, one of whom characterized Odell Johnson and his friends as "ticking bombs," and also concerned about Johnson's allusions to disgruntled employees' resort to shooting massacres in the context of his own self-characterization as a frustrated, highly stressed, self-perceived abused employee. Further, in light of Smith's non-affirmance of Odell

Johnson's actual official status, they wanted to clear up that issue. Thus, a meeting was held on August 24, 1996.

5 At the August 24, 1996, meeting were Kieleszewski, Wellman, Nancy Johnson, union business agent Donald Smith, steward Harvey Sharpley, and Charging Party Odell Johnson.

10 Odell Johnson's recollection of the meeting, as elicited by the General Counsel, was inconsistent, vague, uncertain, cryptic, selective, evasive, and uncertain. He admitted to a lack of recollection of much of the conversation, Kieleszewski was corroborated by Wellman, and for the most part by General Counsel witness Smith. General Counsel witness Sharpley testified but was generally silent as to the meeting. I credit Kieleszewski. It is undisputed that the Charging Party's status as alternate steward was discussed, and it was agreed that the Union would confirm in writing, pursuant to the collective-bargaining agreement, that Odell Johnson was an official alternate steward. Smith himself had not been officially notified
15 previously.

20 Nancy Johnson's precarious health condition was explained in detail to Odell Johnson who was instructed that in any future confrontation, if Nancy Johnson asked him to desist, he should immediately do so and take his complaints to Wellman.

Odell Johnson's references to employment-site massacres were discussed in the context of his claims of being "stressed out." Smith agreed with Kieleszewski's advice that a lot of talk of massacres tends to upset employees.

25 Kieleszewski next referred to the employee complaints of lies in Johnson's letters.

30 According to Kieleszewski, he then told Odell Johnson that he could write all the letters he wanted to write but he could tell no lies in those letters. Smith's recollection was that Kieleszewski initially told Johnson that he had to stop writing letters entirely or otherwise he would be discharged, at which point Smith protested Johnson's absolute constitutional right to write his letters. Smith testified that Kieleszewski immediately retracted and said yes, Johnson did have a right to continue his writing of letters but that he must tell the truth therein or be discharged.

35 Kieleszewski did recall Smith's intervening protest of Johnson's constitutional right and testified that he agreed that Johnson could write as many letters as he wanted to anyone, including President Clinton, but that they must not contain lies. Kieleszewski stated that he reiterated this statement at least three times during the meeting. To the extent that Smith's testimony differs from Kieleszewski's, I credit the latter as the more detailed and certain
40 witness. Smith had to be led somewhat by the General Counsel. He was far less assured in his recollection and admitted to having testified to an inconsistent version in the arbitration proceeding.

45 Odell Johnson conceded that after Kieleszewski threatened to discharge him for writing letters, Smith immediately protested his constitutional right to write as many letters as he wanted to. Johnson testified that he could not recall what was said after that. Thus, even if Smith were credited, there is no contradiction, even from Odell Johnson, that after Smith's protest, he was ordered not to stop writing letters but to stop publishing lies.⁵

⁵ General Counsel witness Sharpley testified that he did not hear Kieleszewski tell Johnson that if he wrote another letter he would be fired but he did hear him state that Johnson could

After the meeting, Johnson proceeded to perform his assigned work. Then he rushed home to draft and send by fax, before midnight on the same day, the letter which precipitated his discharge.

The first of 13 addressees of that letter was Nancy Johnson. The others were a variety of the Respondent's managers, including Wellman, the Chairman of the Ford Motor Company, Attorney General Janet Reno, the president of the NAACP, the local FBI, the EEOC, the Michigan State Police, the Chairman of the U.S. House Ways and Means Committee, and union agents Smith and Sharpley.

In that letter of four single-spaced pages, the Charging Party complained of the meeting held only hours earlier and characterized therein what had occurred, i.e., racist intimidation. However, he does present details of his version of what happened which in fact, by subject matter, generally tracks Kieleszewski's testimony. However, his letter contains the following statement in item 11 of what Kieleszewski allegedly stated:

11. I if write any more letter [sic] to you, my readers, I would be terminated, effectively immediately.

There is nothing in the letter of August 24 that contains any reference to any complaint or grievance of any other employee.

Kieleszewski testified that upon receipt of his faxed copy of the letter, and after reading the above quoted accusation, he concluded that it was "an out and out lie." He then discussed the letter with Wellman who also had concluded that item 11 was a "blatant lie." It is un rebutted that they then contacted business agent Smith, asked him if there was any way Charging Party Odell Johnson could have interpreted what was said in the meeting as what he wrote in item 11 of his letter and that Smith responded in the negative.

Kieleszewski testified that he was concerned that if he did not act on the matter, Johnson would take what was said at the meeting as an idle threat. Johnson next reported for work on Saturday, August 26, but was told by the manager on duty, Jim Dandepry, that he could not work again until he spoke with Wellman on the following Monday, August 24. On that Monday, Johnson met with Wellman who said that it was necessary that a meeting be set up to discuss his status. After mutual negotiation on dates, a meeting was agreed upon to be held on September 1, 1995.

On August 31, Johnson received a letter from Kieleszewski dated August 25 which purported to summarize what was discussed at the August 24 meeting. With respect to letter writing, it stated:

3) I informed you that we were very concerned about your letters talking about post-office massacres happening at Hertz. I informed you that if you were dishonest and told any lies in your letters that you would be terminated. Don Smith said that you had a right to write these letters. I told him I agreed but the letters had to be the truth. I informed you that you would be terminated if you lied in your letters. Don Smith said you should stick to the facts.

write to President Clinton himself if he wanted to, but that he must not tell lies.

Hopefully, you understand the Company's position and will comply.

Johnson testified that he had drafted the letter immediately after the meeting.

5 The September meeting took place on schedule. In attendance at this meeting were most of the same people who had attended the August 24 meeting.

10 Kieleszewski gave the only detailed account of what was said at this meeting. He was not contradicted by either Smith or Sharpley, but rather corroborated in significant part by Wellman. The testimony elicited from Odell Johnson by the General Counsel as to his meeting was again extremely cryptic, i.e.:

Q. And to your recollection, what was said at that meeting and by who?

15 A. Eventually they got around to saying that I had -- Mike said I had lied in my letters.

Q. Did he say what you lied about?

A. I did never find out about what I had lied about until the arbitration meeting [i.e., item 11.]

20 Except for reiteration of the above testimony, Johnson's version of what was said was never elicited. I must credit the more detailed testimony of Kieleszewski as corroborated by Wellman. I find that at the September 1 meeting, all parties, including Smith, reviewed what was said at the August 24 meeting and all agreed that with respect to item 11 of Johnson's letter, no such interpretation could be given as to what in fact was said by Kieleszewski. Johnson protested that was not his recollection. Kieleszewski then asked him what he thought was meant when Kieleszewski told him he could write to President Clinton himself but he could not lie. To that, Johnson merely shrugged and made no explicit denial.⁶

30 General Counsel witness Smith merely testified that the Union requested Johnson's reinstatement on the grounds that what was contained in his August 24 letter was his interpretation of what was said but Kieleszewski insisted that the letter was clearly false. He did not otherwise contradict Kieleszewski.

35 By letter dated September 1, 1995, from Kieleszewski to the Charging Party, the latter was informed that he had been informed on August 24 that "any lies in future letters would be grounds for immediate termination [and] In your letter dated August 24th you blatantly lied." He was further notified of immediate termination "for dishonesty and failure to follow a direct order."

40 The Union pursued Odell Johnson's discharge through the grievance procedure to an arbitration hearing which resulted in a decision issued on December 13, 1996.

45 The arbitrator considered the issue of whether Johnson's conduct in drafting item 11 of his August 24 letter fell within the "dishonesty" definition of Section 2 of Article X of the collective-bargaining agreement to warrant discharge. He then disagreed with the Union that item 11 was not a "lie," after noting that Johnson "chose not to testify" at the hearing as to "his perception of the circumstances." The arbitrator then concluded:

⁶ The General Counsel did not elicit a rebuttal to this testimony.

At this point I am forced to find that the misstatement or lie that the Employer has referred to has been established and indeed such conduct falls within dishonesty as the term is utilized in Section 2 of Article X [of the collective-bargaining agreement].

- 5 The arbitrator held that Johnson had engaged in serious misconduct and also rejected the Union's argument that even if Johnson's letter was not true, it did not fall within the contractual definition of dishonesty. He stated:

10 First of all, we must keep in mind that the grievant's written rendition of what took place during a meeting between the Employer, the grievant and the bargaining unit's exclusive bargaining agent, goes to the very heart of the relationship between the Union and the Employer. A lie or misrepresentation about what took place during those meetings, which is disseminated to fellow employees, and the other individuals to whom the grievant sent his letter, has the potential of severely disrupting the work force, inflaming the employees' anger, undermining and making the Union irrelevant, and creating an atmosphere of tension and anxiety which could lead to very serious consequences. 15 Given that realization, at a minimum an employee, if writing a letter or newsletters, as the grievant did herein, must be honest and truthful. If not, there is no question in my mind that the Employer can respond. Furthermore, given the very nature of the potential ramifications of dishonesty, misrepresentation or a lie in such a letter or communication, convinces me that the term "dishonesty," as used in Section 2 of Article X, unquestionably encompasses lies and misrepresentations contained in such communications. 20

25 The arbitrator also considered that Johnson had claimed in his grievance that his discharge was motivated by his having "filed complaints with the NLRB, EEOC and union grievances." He concluded that there was no evidence of "NLRB claims" and "EEOC claims" in the record before him, but he held, even if there had been such evidence there was before him "just no evidence" that the Respondent was motivated by such factors. 30

Analysis

The General Counsel in her brief correctly states the Board's policy concerning arbitration deferral as follows:

35 Deferral to the award of an arbitrator is appropriate if the arbitration "proceedings appear to have been fair and regular, all parties had agreed to be bound, and the decision of the arbitration panel is not clearly repugnant to the purposes and policies of the Act." *Spielberg Mfg. Co.*, 112 NLRB 1080, 1082 (1955). Deferral is inappropriate under the clearly repugnant standard when the arbitrator's award is "'palpably wrong,' i.e., . . . is not susceptible to an interpretation consistent with the Act." *Olin Corp.*, 268 NLRB 573, 574 (1984); *110 Greenwich Street Corp.*, 319 NLRB 331, 335 (1995). 40

45 The General Counsel in the brief concedes that the arbitration hearing was fair and regular and that both parties agreed to be bound thereby, but she argues that the arbitrator's decision was "clearly repugnant to the Act" because it "upholds" an unfair labor practice discharge, it is "palpably wrong and not susceptible to an interpretation consistent with the Act." She argues that this is so because the arbitrator "did not focus on the protected concerted nature of the Charging Party's letter writing [and] only considered whether the Charging Party was untruthful in his letter of August 24, 1995."

The General Counsel then goes on to argue that certain of Odell Johnson's pre-August 24 letters related mutual employee working condition concerns and thus constituted concerted protected activity. The Respondent does not argue otherwise. However, the General Counsel proceeds one step further to conclude that because some of those letters were of a concerted nature, "his letter writing activity as a whole remained protected." The General Counsel also argues that Odell Johnson's grievance processing activities were also protected. Again, the Respondent does not suggest otherwise. The General Counsel, however, argues that the letter writing activity was necessarily entwined with his grievance processing activity to which the Respondent manifested animus. However, as noted above, I find insufficient, cogent evidence of any deep-seated, vindictive animus toward Johnson because of his grievance activity and none toward his letter writing *per se*, save a concern that he write the truth and avoid inflammatory references to work-site massacres.

Finally, the General Counsel makes the final leap in her logical progression by arguing that the Charging Party had engaged in concerted protected activity which did not lose its protection because of "offensive, defamatory or opprobrious remarks or even false or misleading statements." She cites, *inter alia*, *KBO, Inc.*, 315 NLRB 570 (1994), and *Delta Health Center, Inc.*, 310 NLRB 26, 36 (1993). But she recognizes that those cases also hold that "deliberately or malicious false" statements or statements made with "reckless disregard for the truth" are not protected.

The General Counsel's argument apparently proceeds upon the assumption that even if Johnson's discharge was motivated only by item 11 of his August 24 letter and not his preceding protected activities, which conclusion I find to be the fact, it in itself is concerted activity. Apparently, assuming that the August 24 letter was somewhat within the *res gestae* of his preceding concerted activities and otherwise protected in the absence of misconduct, the General Counsel argues that it did not lose its protection because Johnson did not state a deliberate falsehood. She comes to this conclusion unsupported by the record evidence as adduced by the General Counsel. The totality of Johnson's defense for writing an unambiguously clear, false statement, as correctly found by the arbitrator, was his testimony that he did not intend to state a falsehood in the August 24 letter. The General Counsel failed to elicit any non-leading testimony to explain his false accusations. He testified that at the time of trial, he did not recall anything after business agent Smith's protest of his constitutional right to write letters. He did not explicitly testify that when he sat down only a few hours after the meeting and committed to his letter a wide variety of details of his perceived mistreatment in that meeting, he somehow forgot the very climax and outcome of what he, in effect, described as a contest between Smith and Kieleszewski as to his right to letter utterances. That he should forget details even after so little a lapse of time might be understandable. That he should forget what under his and Smith's version was a highly significant retraction by Kieleszewski is inexplicable and incredible. It is even more incredible in light of his failure to explicitly contradict Kieleszewski at the September 1 meeting.

The General Counsel's argument in the brief that Odell Johnson had only partial recollection when he wrote his letter or only had heard part of Kieleszewski's remarks is completely speculative and unsupported by testimony.

I find that the record in this case, as constructed by the General Counsel, fails to disclose evidence of any animus toward the charging Party's concerted protected activities, fails to disclose evidence that the May 24 letter was merely a pretext to cover that animus, and fails to disclose meaningful testimony from the Charging Party upon which to conclude that his August 24 letter, item 11 statement, was anything other than a deliberate false accusation or, at

the very least, a reckless disregard for the truth in the context of a colloquy that, as the arbitrator found, had an inflammatory tendency to disrupt the employer-union relationship in the Respondent's facility.

I find that the General Counsel has adduced no testimony that could have impacted the arbitrator's decision, had it been presented to him. Although the arbitrator did not apply the explicit standard for the loss of protection of concerted protected activities, the standard applied by him was in effect the same, i.e., dishonesty, which, by any definition, implies intent to deceive. As the Respondent correctly argues, the arbitrator need not specifically state that he addressed the unfair labor practice issue, nor need his award read expressly in terms of the statutory standard, nor be totally consistent with Board law, but it must be susceptible to an interpretation consistent with the Act. *Motor Convoy, Inc.*, 303 NLRB 135-137 (1991). Stated another way, the question is whether the arbitrator considered the essential unfair labor practice issue regardless of the failure of his record to include evidence of union or concerted protected activities. *Derr and Gruenwald Construction Co.*, 315 NLRB 266, 267 (1994).

I find that the arbitrator, in effect, followed the same criteria for the loss of protection for concerted activities when he decided that the Charging Party had "lied" and engaged in "dishonest" misrepresentation. I find that even if the August 24 letter constituted concerted activity, the arbitrator applied essentially the same standard for loss of protection under the Act and that his decision is not repugnant to the Act. I find that the General Counsel has failed to adduce relevant probative evidence that should have been, but was not considered by the arbitrator. *Olin*, supra; *United Parcel Service*, 274 NLRB 396 (1985).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁷

ORDER

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁸

The complaint is dismissed.

Dated, Washington, D.C.

Thomas R. Wilks

⁷ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

⁸ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

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